FILED BY CLERK
MAY 21 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GILBERT GOODE, JR., Appellant.	2 CA-CR 2008-0221 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071370

Honorable Barbara Sattler, Judge

AFFIRMED AS MODIFIED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Stephan J. McCaffery
Tucson
Attorneys for Appellant

B R A M M E R, Judge.

¶1 Appellant Gilbert Goode, Jr., appeals his convictions of two counts of aggravated driving under the influence of an intoxicant (DUI). He argues the trial court abused its discretion in denying his motion to dismiss the charges against him, because investigating officers violated his right to communicate privately with his attorney. He further contends the court abused its discretion in denying his motion for a mistrial based on a witness's inappropriate statements during trial. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Goode's convictions. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In February 2007, Arizona Department of Public Safety (DPS) officer Douglas Scheck saw Goode driving erratically. Goode's vehicle wandered out of its lane multiple times before Scheck stopped him. When Scheck approached the driver's side of Goode's vehicle, Scheck noticed the odor of intoxicants emanating from Goode's vehicle. Goode had bloodshot eyes and slurred speech. When Scheck asked Goode to step out of his vehicle, Goode appeared unsteady and swayed as he stood. After Goode refused to participate in field sobriety tests. Scheck arrested Goode, transported him to the DPS station and, when Goode refused to give a blood sample, obtained a search warrant to draw a sample of Goode's blood. Testing showed Goode's blood alcohol concentration was .188 and further investigation revealed Goode's driver license was suspended.

¶3 A grand jury charged Goode with aggravated DUI while his license was suspended and aggravated driving with an alcohol concentration of .08 or higher while his

license was suspended. After a three-day trial, a jury found Goode guilty of both charges. The trial court sentenced Goode to two concurrent, presumptive, ten-year terms of imprisonment. The court also ordered Goode to pay "[a] fine of $750," "$250 to the DUI Abatement Fund," "$1,500 to the State General Fund," and "$1,500 to the Prison Construction and Operations Fund." The court then "reduced [those fines and assessments] to a criminal restitution order . . . pursuant to A.R.S. § 13-805." This appeal followed.

Discussion

Private consultation

¶4 Goode contends the trial court erred in denying his motion to suppress evidence obtained after he had requested to speak with an attorney at the DPS station and to dismiss the charges against him because, he asserts, Scheck violated his right to communicate privately with his attorney. We review the court's denial of Goode's motion for an abuse of discretion. *See State v. Szpyrka*, 220 Ariz. 59, ¶ 2, 202 P.3d 524, 526 (App. 2008); *State v. Medina*, 190 Ariz. 418, 420, 949 P.2d 507, 509 (App. 1997). Insofar as Goode's motion raised questions of law, we review them de novo. *See Szpyrka*, 220 Ariz. 59, ¶ 2, 202 P.3d at 526. And, in reviewing the court's ruling, we consider only the evidence presented at the suppression hearing, viewed in the light most favorable to upholding the court's ruling. *See id.*

¶5 At the hearing on Goode's motion, Scheck testified that, after Goode arrived at the DPS station and was placed in a "holding cell room," he asked to speak with an attorney and to use a telephone directory. When Scheck handed Goode a directory, Goode asked Scheck to dial a number for him. Scheck complied, but no one answered the call. Scheck

dialed a second number for Goode and redialed the first but, again, no one answered. Goode then asked Scheck to call two other attorneys but, when Scheck asked for their telephone numbers, Goode told Scheck he did not know them and he did not attempt to find them in the directory. Goode then searched the directory again and asked Scheck to call a law firm. After dialing the law firm's number, Scheck handed the telephone to Goode, who left his contact information with the law firm's answering service. The firm, however, never returned Goode's call. Goode never asked for privacy while attempting to contact any of the attorneys. Goode testified, however, that he did not feel he could "say what [he] want[ed] freely" to an attorney because Scheck had remained in the room with him. The trial court denied Goode's motion.

¶6 Goode asserts Scheck violated his right to consult an attorney in private by remaining in the holding room while Goode attempted to contact an attorney. It is well-established that the right to counsel includes the right to consult with an attorney in private. *See State v. Holland*, 147 Ariz. 453, 455, 711 P.2d 592, 594 (1985); *Municipal Court v. Waldron*, 157 Ariz. 90, 92-93, 754 P.2d 1365, 1367-68 (App. 1988). This is because a defendant's right to counsel requires that he "be allowed to [consult with an attorney] in a meaningful way," and "effective representation [would not be] possible without the right of a defendant to confer in private with his counsel." *Holland*, 147 Ariz. at 455, 456, 711 P.2d at 594, 595. And, when a defendant's right to consult privately with his attorney has been violated, "dismissal of [all] charges [against him] is required." *Id*. at 456, 711 P.2d at 595.

¶7 But, as we have noted, Goode never successfully contacted an attorney. Nonetheless, Goode asserts his right to private consultation was violated "regardless of whether there [wa]s actual consultation," because Scheck's remaining in the room while Goode attempted to contact an attorney "chill[ed] [his] efforts to speak with an attorney." Goode, however, cites no authority to support this assertion, and we find otherwise. *See id.* at 456, 711 P.2d at 595 (right to private consultation with counsel "[o]nce defendant beg[ins] talking to counsel").

¶8 Even assuming the right to consult an attorney in private includes the right to attempt to contact an attorney in private, Scheck's presence in the holding room did not violate that right. A defendant is not denied the right to private consultation when neither he nor his attorney requests such privacy. *Waldron*, 157 Ariz. at 93, 754 P.2d at 1368; *see also Holland*, 147 Ariz. at 455, 456, 711 P.2d at 594, 595 (defendant denied right to private consultation based "[o]n the facts of th[e] case" that defendant's attorney had requested privacy during consultation). Thus, because Goode never requested privacy, Scheck could not have violated Goode's right to private consultation.

¶9 Nevertheless, Goode suggests *Waldron*'s reasoning is "flaw[ed]" and "has no persuasive force," because it "flies in the face of common sense." Relying on *State v. Durbin*, 63 P.3d 576 (Or. 2003), Goode insists he did not need to ask for privacy specifically, because "an invocation of the right to consult with an attorney is an invocation of the right to consult an attorney in private." In *Durbin*, the Oregon Supreme Court, interpreting the right to counsel under that state's constitution, noted:

> The request for counsel, by itself, indicates that the arrested driver wants the essential elements that inhere in that right, including the opportunity for confidential communication. A driver arrested for DUI[] who asks to speak to a lawyer need not make a further, independent request for confidentiality.

63 P.3d at 580. Goode argues "*Durbin*'s reasoned determination of the matter provides reason for this Court to accept its conclusion," and disregard *Waldron*'s contrary conclusion.

¶10 We disagree. *Durbin*'s reasoning and ultimate conclusion were based on the Oregon Supreme Court's interpretation of the Oregon constitution. Our caselaw, in contrast, is based on the Sixth Amendment to the United States Constitution and Rule 6.1(a), Ariz. R. Crim. P. *See Holland*, 147 Ariz. at 455, 711 P.2d at 594; *McNutt v. Superior Court*, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982); *see also Waldron*, 157 Ariz. at 93, 754 P.2d at 1368 (citing *Holland*). Goode cites no authority, nor have we found any, supporting his argument and so interpreting either our rules of criminal procedure, the Arizona constitution, or the federal constitution. *Durbin*, moreover, is factually distinguishable from the situation before us. The defendant in *Durbin* successfully contacted an attorney and consulted with him telephonically in the presence of law enforcement officers. 63 P.3d at 577. Goode, of course, never successfully contacted or consulted with an attorney.

¶11 Last, Goode suggests Scheck should have "at least inform[ed] [him] that he could have the privacy if he asked for it," because otherwise an arrestee would "believe that consultation in private was not an option." He contends Scheck "behaved in a manner that would lead any reasonable person to believe privacy was not available," thereby violating his constitutional rights. But Goode neither cites legal authority to support this suggestion nor

develops it in any meaningful way. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). Moreover, Goode insists in his reply brief that, despite the aforementioned statements, he did not intend to argue on appeal "that the violation occurred because police failed to advise [him] that he could speak with an attorney in private." Rather, he explains, he intended only to argue "that his request to consult an attorney was a request to consult in private," an argument we rejected above. Accordingly, we do not address Goode's apparent suggestion further.

Witness comment

¶12 At trial, criminalist Raina Ramirez testified she had performed an analysis of Goode's blood and found it contained an alcohol concentration of .188. On cross-examination, Goode's counsel questioned Ramirez about her academic performance in college. Ramirez admitted having failed two chemistry courses but stated she did not recall having failed any others. After Goode's counsel attempted to refresh Ramirez's recollection with a copy of her college transcript, Ramirez protested:

> I am not going to answer any of these questions. This is a personal attack on me. The defense got a copy of [the transcript] without my permission. They have been using it to slander me. I'm not going to answer any questions. This is low and dirty.

The court immediately interrupted Ramirez and instructed her she was required to answer Goode's questions or it would strike the entirety of her testimony. Goode then moved for a mistrial, arguing Ramirez's statements would prejudice the jury against him and improperly affect the verdicts. The trial court denied Goode's motion, reasoning that if any prejudice resulted from Ramirez's "outburst," it would be against the state, not Goode. After Ramirez

agreed to answer the questions, Goode continued his cross-examination of Ramirez without further incident.

¶13 Goode contends the trial court erred in denying his motion for a mistrial. A mistrial is "the most dramatic remedy for a trial error" and should only be granted when "justice will be thwarted otherwise." *State v. Roque*, 213 Ariz. 193, ¶ 131, 141 P.3d 368, 399 (2006); *see also State v. Herrera*, 203 Ariz. 131, ¶ 4, 51 P.3d 353, 356 (App. 2002). "In deciding whether a mistrial is required due to witness comments, the trial court must consider whether the comments caused jurors to consider improper matters and the probability that the jurors were influenced by such comments." *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995). "And[,] because the trial judge is in the best position to assess the impact of a witness's statements on the jury, we defer to the trial judge's discretionary determination." *State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003). We review the trial court's denial of Goode's motion for an abuse of discretion and will reverse only if its decision is "'palpably improper and clearly injurious.'" *Murray*, 184 Ariz. at 35, 906 P.2d at 568, *quoting State v. Walton*, 159 Ariz. 571, 581, 769 P.2d 1017, 1027 (1989).

¶14 Goode asserts Ramirez's comments "impugned" him and his counsel, portraying them as "hav[ing] low morals," and "certainly had an effect" on the jury's verdicts. Goode contends that, because a prosecutor's comments impugning opposing counsel's integrity are cause for a mistrial when they may have affected the jury's verdicts, Ramirez's comments likewise required a mistrial. *See State v. Velazquez*, 216 Ariz. 300, ¶ 52, 166 P.3d 91, 103 (2007) (counsel may not impugn opposing counsel's character); *State v. Newell*, 212 Ariz.

389, ¶¶ 66-67, 132 P.3d 833, 847 (2006) (prosecutor's comments impugning opposing counsel's integrity constitute prosecutorial misconduct requiring reversal if reasonable likelihood comment affected jury's verdict). Goode asserts Ramirez, a state's witness and state employee, "was essentially an arm of the prosecution" and, "[i]n the jury's eyes, there would be little difference between Ramirez and the prosecutor." Thus, "[t]hat Ramirez was not the prosecutor," Goode reasons, "does not relieve the state of its responsibility for her outburst."

¶15 But Goode does not cite, nor have we found, any authority supporting his apparent suggestion that an unexpected and inappropriate statement by a state's witness should be attributed to the prosecutor and treated as prosecutorial misconduct. Rather, as we have explained, our case law clearly states that a trial court should grant a mistrial based on a witness's improper statements only when the statements exposed the jury to matters it could not properly consider and probably prejudiced the jury against the defendant. *See Murray*, 184 Ariz. at 35, 906 P.2d at 568.

¶16 First, Ramirez's comment did not involve excluded evidence, precluded witnesses, or any other information the jury would not be entitled to consider. Rather, her comment consisted of an emotional outburst showing that she had felt unfairly attacked. As the state notes, our courts and courts of other jurisdictions have concluded that although such outbursts are inappropriate, even when hostile to the defendant or his counsel, they do not necessarily require a mistrial. *See, e.g., State v. Bible*, 175 Ariz. 549, 598, 858 P.2d 1152, 1201 (1993) (no mistrial warranted when witness watching trial exclaimed defendant was

"f—ing a—hole"); *Garcia v. State*, 949 So. 2d 980, 993 (Fla. 2006) (no mistrial necessary when witness directed hostile comment at defense counsel but comment "d[id]n't really imply in any way that the defendant [wa]s guilty," jury probably not influenced by comment, and no curative instruction given); *State v. Cruz*, 594 A.2d 1082, 1086 (Me. 1991) (no mistrial necessary when, on cross-examination, state's witness lost temper, accused defense counsel of trickery, and refused to answer further questions); *People v. Harvin*, 680 N.Y.S.2d 81, 82 (N.Y. App. Div. 1998) (no mistrial or curative instruction necessary when state's witness accused defendant's counsel of drug use during cross-examination); *State v. Simmons*, 662 S.E.2d 559, 561 (N.C. Ct. App. 2008) (victim's outburst during testimony calling defendant "son of a b—h" and exclaiming in response to questioning "How dare you put me through this . . . !" did not necessitate mistrial).

¶17 Second, Goode has not shown how Ramirez's comments influenced the jury in an unfair manner against him. *See Murray*, 184 Ariz. at 35, 906 P.2d at 568. The trial judge, who heard Ramirez's comments and was in the best position to assess their likely effect on the jury, concluded the comments, if they influenced the jury at all, likely would have prejudiced the prosecution. *See Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d at 244. Indeed, Ramirez's outburst occurred during Goode's efforts to call into question her qualification and credibility as an expert witness. Her comments that Goode was unjustified in raising her past academic performance and her refusal to answer further questions on the subject were contradicted by the court when it noted, in the jury's presence, that Goode's questioning was proper and instructed Ramirez she was required to answer the questions. Thus, Ramirez's comments

likely made her appear unprofessional in the eyes of the jury, perhaps undermining her credibility. Goode nonetheless insists that, apparently despite the court's statements to the contrary, the jurors could have believed her accusations that his attempt to impeach her was improper, prejudicing them against him. But we will only disturb the court's denial of Goode's motion if the jury was "probab[ly]," not simply possibly, prejudiced against him by Ramirez's comments. *Murray*, 184 Ariz. at 35, 906 P.2d at 568; *cf. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d at 847 (we presume jurors follow court's instructions). Because the court's conclusion that Goode probably had not been prejudiced by Ramirez's outburst and its denial of Goode's motion on that basis were not "'palpably improper and clearly injurious,'" we cannot say the court abused its discretion here. *Murray*, 184 Ariz. at 35, 906 P.2d at 568, *quoting Walton*, 159 Ariz. at 581, 769 P.2d at 1027.

Disposition

¶18 For the foregoing reasons, we affirm Goode's convictions. We note, however, that following Goode's sentencing this court held that "a trial court has the authority to enter judgment [at the time of sentencing] for the total amount a defendant will be required to pay, including fines, fees, costs, and restitution," but may not enter a criminal restitution order pursuant to § 13-805 until "the expiration of a defendant's sentence or period of probation." *State v. Lewandowski*, 553 Ariz. Adv. Rep. 13, ¶¶ 7, 10 (Ct. App. Mar. 31, 2009). Although Goode failed to contest the court's entry of a criminal restitution order against him, the premature entry of a criminal restitution order constitutes an illegal sentence and is necessarily fundamental, prejudicial error. *See id.* ¶ 15. We, therefore, vacate the trial court's

"reduc[tion]" of Goode's fines and assessments to a criminal restitution order, but affirm the remainder of his sentences.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

GARYE L. VÁSQUEZ, Judge

JOSEPH W. HOWARD, Judge